

The Leavitt Corporation and Local No. 592, United Food & Commercial Workers Union, AFL-CIO, Case 1-CA-21079

15 December 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

Upon a charge filed on 6 June 1983¹ by Local No. 592, United Food & Commercial Workers Union, AFL-CIO (the Union), and duly served on The Leavitt Corporation (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on 23 June, against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 31 March, following a Board election in Case 1-RC-17572,² the Union was duly certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate; and that, commencing about 6 April, and at all times thereafter, the Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 8 July, the Respondent filed its answer, and on 19 July its amended answer, to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 1 August, the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 4 August, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be

granted. The Respondent thereafter filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

In its amended answer and response to the Notice to Show Cause, the Respondent admits that it has refused to bargain with the Union, but alleges that the Board's certification of the Union was improper. Specifically, the Respondent submits that the Board erred in overruling its objections to the election and in voiding a ballot which had been signed by the employee. The Respondent further submits that it was denied due process by the Board's failure to order an evidentiary hearing and to consider the entire record in the underlying representation case.

Our review of the record herein, including Case 1-RC-17572, reveals that, on 23 April 1982, an election was held pursuant to a Stipulation Upon Consent Election and a majority of the employees in the designated unit cast votes for the Union. Thereafter, the Respondent filed timely objections to the conduct of the election alleging, inter alia, that a signed ballot voided by the Board agent should have been counted,³ and that employee Steve Giordano, a member of the Union's organizing committee and a union observer at the polls, deprived the Respondent of its right to campaign and coerced employees by tearing down the Respondent's "Have A Nice Day—Vote No" posters on the morning of the election. In this connection, the Respondent contends that Giordano was an agent of the Union and, further, that his wearing a union button while acting as an observer implied Board sanction of his conduct.

Following his investigation on 23 June 1982, the Regional Director issued his Report on Objections recommending that the objections be overruled in their entirety. The Respondent then filed with the Board its exceptions to the report. On 31 March 1983, the Board issued its Decision and Certification of Representative in Case 1-RC-17572⁴ adopting the Regional Director's recommendations and certifying the Union as the exclusive bargaining representative of the employees in the appropriate

¹ Unless otherwise indicated, all dates refer to 1983.

² Official notice is taken of the record in the representation proceeding, Case 1-RC-17572, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Chairman Dotson notes that he was not a member of the panel that issued the initial Decision and Certification of Representative in these proceedings. However, he accepts the Board's findings and conclusions therein for purposes of passing on the instant motion.

³ The tally of ballots reveals that 43 votes were cast for, and 34 against, the Union. There were eight challenged ballots and three were void. Had the signed ballot, which contained a "no" vote, been counted the number of challenged ballots would be sufficient to affect the results of the election.

⁴ Not published in volumes of Board Decisions.

unit, and thus finding that the Respondent's objections did not raise substantial and material issues warranting a hearing.

Thereafter, on 6 April, the Union requested in writing that the Respondent recognize and bargain collectively with it as the exclusive bargaining agent of the Respondent's employees. For the reasons set forth in its objections to the election and exceptions to the Regional Director's report, the Respondent refused, and continues to refuse, to bargain with the Union. It appears, therefore, that the Respondent is attempting now to raise issues which have been specifically considered and resolved by the Board in the underlying representation case.

The Respondent now also contends that the Board abused its discretion by failing to review the entire record in the underlying representation case. We find no merit in this contention. Pursuant to Section 102.69(g)(1)(ii) of the Board's Rules and Regulations, on the filing of exceptions to his report, the Regional Director transmitted to the Board his Report on Objections with exhibits attached. Filed with the Respondent's exceptions was its brief with affidavits attached. Together, these documents comprised the record considered by the Board in Case 1-RC-17572. Not transmitted by the Regional Director, and therefore not considered by the Board, was the affidavit of Giordano obtained by the Regional Director in the course of his investigation, in which Giordano admitted the conduct alleged but denied acting on the Union's instructions.⁵ It is the failure to consider this statement in adopting the Regional Director's recommendations which the Respondent submits was a denial of due process.

Contrary to the Respondent's contention, Giordano's affidavit would not properly have been part of the record. In accord with our policy of protecting investigatory affidavits from disclosure when the witnesses who gave them have not testified at a hearing, statements of witnesses are expressly excluded from the record. *Frontier Hotel*, 265 NLRB 343 (1982), citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).⁶ Thus, the affidavit was properly excluded from the record, and the Board's attendant failure to consider it was not an abuse of discretion or a denial of due process.

It is well settled that in the absence of newly discovered or previously unavailable evidence or spe-

cial circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁷

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Leavitt Corporation is a Massachusetts corporation with its principal place of business in Everett, Massachusetts, where it is engaged in the manufacture and sale of peanut food products. The Employer annually purchases and receives at its Everett facility goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts and annually ships from its Everett facility goods valued in excess of \$50,000 to points outside the Commonwealth of Massachusetts.

We find, on the basis of the foregoing, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local No. 592, United Food & Commercial Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining

⁵ The Respondent also contends that the affidavit could prove that Giordano acted as an agent of the Union in tearing down the Respondent's posters. In its decision in Case 1-RC-17572 at fn. 2, however, the Board explicitly found it unnecessary to pass on the agency issue since Giordano's conduct was isolated and "would not tend substantially to interfere with the election even if attributable to [the Union]."

⁶ See also *Decibel Products*, 267 NLRB 1053 (1983).

⁷ See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees, lab technicians, shipping and receiving employees and truck drivers employed by the Employer at its Everett, Massachusetts facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On 23 April 1982, a majority of the employees of the Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with the Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 31 March 1983 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and the Respondent's Refusal*

Commencing about 6 April 1983, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing about 6 April 1983, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since 6 April and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of The Leavitt Corporation set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, on the basis of the foregoing facts and the entire record, makes the following

CONCLUSIONS OF LAW

1. The Leavitt Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local No. 592, United Food & Commercial Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, lab technicians, shipping and receiving employees and truck drivers employed by the Employer at its Everett, Massachusetts facility, but excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 31 March 1983, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 6 April 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board hereby orders that the Respondent, The Leavitt Corporation, Everett, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local No. 592, United Food & Commercial Workers Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees, lab technicians, shipping and receiving employees and truck drivers employed by the Employer at its Everett, Massachusetts facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Everett, Massachusetts facility copies of the attached notice marked "Appendix."⁸

⁸ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment

Copies of the notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 592, United Food & Commercial Workers Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees, lab technicians, shipping and receiving employees and truck drivers employed by the Employer at its Everett, Massachusetts facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

THE LEAVITT CORPORATION